Malaysia Building Society Bhd v Ghazi bin Hasbollah

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–206–91
MAHADEV SHANKAR J
1 MARCH 1994

Civil Procedure *— Summary judgment — Delay in applying for summary judgment — Whether application should be struck out*

Civil Procedure *— Amendment — Delay in filing amended statement of claim — Whether amended statement of claim should be allowed*

Contract *— Illegality — Contract to avoid sale by auction — Whether in contravention of s 266 of the National Land Code 1965 — National Land Code 1965 s 266*

The defendant charged his land to the plaintiff as security for a loan granted in 1984. The defendant defaulted in complying with the terms of the loan and the plaintiff obtained an order for sale of the land by public auction. However, before the sale was carried out, the defendant pleaded with the plaintiff to call the sale off on the basis that he had obtained a refinancing loan from Arab Malaysian Finance Bhd ('AMFB'). The plaintiff agreed to do so and entered into an agreement ('the agreement') with the defendant whereby the plaintiff agreed to call off the sale and discharge its charge in return for the payment of part of the sum outstanding by AMFB and the balance to be paid by the defendant under a private arrangement of RM2,000 per month.

After two instalments, the defendant defaulted and the plaintiff filed a writ on 15 July 1991 for the recovery of RM244,252.32 owed under the agreement. The plaintiff subsequently applied to amend the statement of claim and the order was granted on 9 October 1991. An amended statement of claim was filed on 25 November 1991, ie more than 14 days after the order was made. The plaintiff subsequently filed for summary judgment under O 14 of the Rules of the High Court 1980 on 9 January 1992. The matter was adjourned several times, mostly at the request of the defendant's solicitors. By the date of hearing of the application, the defendant had not filed any affidavit to show cause why leave to defend should be granted. Counsel for the defendant raised the preliminary objections that: (i) the delay of 4½ months in filing the O 14 application was such that it should be disallowed; and (ii) the affidavit-in-support of the application was defective. The senior assistant registrar dismissed the preliminary objections and refused to permit the defendant to file an affidavit as to merits. The defendant appealed.

The appeal against the registrar's decision not to allow the defendant to file an affidavit as to merits was dismissed and the defendant applied for an adjournment of the hearing of the O 14 application on the grounds that: (i) there were no issues that he could raise as he had

been precluded from filing an affidavit to show cause; and (ii) he intended to apply to amend the defence to raise the issue of illegality of the agreement as it contravened s 266 of the National Land Code 1965. A

Held, disallowing the adjournment and dismissing the appeal: B

(1) Whether or not a lapse of four months from the date of entry of appearance to the date of the filing of the O 14 application is to be regarded as fatal must depend on the circumstances of each case. There is no hard and fast rule that the delay of four months must be held fatal in every case. In view of the sterile defence that had been filed, the O 14 application could not be regarded as C having been filed so late as to deserve to be struck out merely on that ground.

(2) Admittedly, the plaintiff should have filed the amended statement of claim within 14 days of 9 October 1991, regardless of the need to extract the order. However, the objection to the amended statement of claim was highly technical. The error was purely D clerical and the objection taken only increased the costs and added to the inconvenience of the plaintiff whilst it may have gained some time for the defendant.

(3) The defendant had ample opportunity to file his affidavit showing cause why leave to defend should be granted. His omission to do E so was wilful and calculated to delay these proceedings. If there was any dilatoriness, it was on the part of the defendant. He who comes to equity must come with clean hands. The studious avoidance by the defendant in filing any affidavit to show cause why he should be given leave to defend tended to show that the F defendant and the solicitors thought that by taking the matter in two stages they could buy even more time. The registrar decided correctly in dismissing the preliminary objections and in precluding the defendant from filing any further affidavits. The appeal therefore had to be dismissed with costs.

(4) This was not a case of an order made by a land administrator, nor G whether the charge made in favour of AMFB was legally done. It was at the instance of the defendant that the sale ordered by the High Court in Kuala Lumpur was aborted. The plaintiff had discharged their charge over the land with the consent and at the instigation of the defendant. The proposed auction sale was H therefore rendered nugatory because there was no charge to satisfy on that date. The issue of illegality was raised by the defendant who could not be allowed both to approbate and reprobate the same transaction. There was also the question of estoppel. There was nothing intrinsically illegal about the acts undertaken by each of the parties to the said agreement. Therefore, the defence was I devoid of merit.

A **[Bahasa Malaysia summary**

Defendan telah menggadai tanahnya kepada plaintif sebagai cagaran bagi suatu pinjaman yang telah diberikan pada tahun 1984. Defendan telah ingkar mematuhi terma pinjaman itu dan plaintif telah mendapat suatu perintah jualan tanah itu melalui lelong awam. Bagaimanapun, B sebelum jualan itu dijalankan, defendan telah merayu kepada plaintif supaya membatalkan jualan itu atas alasan bahawa beliau telah mendapat suatu pinjaman biaya semula daripada Arab Malaysian Finance Bhd ('AMFB'). Plaintif bersetuju untuk berbuat demikian dan telah mengikat suatu persetujuan ('persetujuan itu') dengan defendan di mana plaintif bersetuju membatalkan jualan itu dan C melepaskan gadaiannya untuk balasan bayaran sebahagian daripada jumlah yang belum dijelaskan itu oleh AMFB dan bakinya dibayar oleh defendan di bawah suatu persefahaman peribadi pada kadar RM2,000 sebulan.

Selepas dua bayaran ansuran dibuat, defendan telah ingkar dan D plaintif memfailkan suatu writ pada 15 Julai 1991 untuk mendapatkan RM244,252.32 yang terhutang di bawah perjanjian itu. Plaintif kemudiannya telah memohon untuk meminda pernyataan tuntutan dan perintah untuk membolehkan pindaan itu telah diberikan pada 9 Oktober 1991. Suatu pernyataan tuntutan yang dipinda telah difailkan pada 25 November 1991, iaitu lebih daripada 14 hari selepas E perintah itu telah dibuat. Plaintif kemudiannya telah memohon untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 pada 9 Januari 1992. Perkara itu telah ditangguhkan beberapa kali, kebanyakannya atas permohonan peguamcara defendan. Menjelang tarikh pendengaran permohonan itu, defendan masih belum F memfailkan sebarang afidavit untuk menunjukkan kausa mengapa kebenaran untuk membuat pembelaan seharusnya diberikan. Peguam defendan telah menimbulkan bantahan permulaan bahawa: (i) kelengahan selama 4½ bulan sebelum permohonan di bawah A 14 difailkan adalah terlalu lama sehingga ia tidak seharusnya dibenarkan; dan (ii) afidavit yang menyokong permohonan itu mempunyai G kecacatan. Penolong kanan pendaftar telah menolak bantahan permulaan itu dan tidak membenarkan defendan memfailkan suatu afidavit mengenai merit pembelaannya. Defendan telah membuat rayuan.

Rayuan terhadap keputusan pendaftar untuk tidak membenarkan H defendan memfailkan suatu afidavit mengenai merit telah ditolak dan defendan telah memohon untuk suatu penangguhan pendengaran permohonan di bawah A 14 itu atas alasan bahawa: (i) tidak ada isu yang boleh ditimbulkan olehnya kerana beliau telah dihalang daripada memfailkan suatu afidavit untuk menunjukkan kausa; dan (ii) beliau berhasrat memohon untuk meminda pembelaan itu supaya I menimbulkan isu kepenyalahan undang-undang persetujuan itu kerana ianya melanggar s 266 Kanun Tanah Negara 1965.

Diputuskan, tidak membenarkan penangguhan dan menolak rayuan itu: A

(1) Sama ada suatu selang selama empat bulan dari tarikh pemasukan kehadiran hingga tarikh permohonan di bawah A 14 difailkan akan dianggap sebagai membawa padah mesti bergantung kepada keadaan setiap kes. Tidak ada peraturan yang tegas dan ketat bahawa kelengahan selama empat bulan mesti dianggap sebagai membawa padah di dalam setiap kes. Memandangkan pembelaan tandus yang telah difailkan, permohonan di bawah A 14 itu tidak boleh dianggap sebagai difailkan dengan begitu lewat sehingga ia sepatutnya dibatalkan semata-mata atas alasan itu. B

(2) Adalah diakui bahawa plaintif seharusnya memfailkan pernyataan tuntuan yang dipinda itu dalam masa 14 days dari 9 Oktober 1991, tanpa mengambil kira keperluan mengambil perintah itu. Bagaimanapun, bantahan kepada pernyataan tuntutan yang dipinda itu adalah sangat teknikal. Kesilapan itu semata-matanya suatu kesilapan perkeranian dan bantahan yang dibuat itu hanya menaikkan kos dan menambahkan kesulitan plaintif manakala ia mungkin telah melengah-lengahkan masa untuk defendan. C D

(3) Defendan mempunyai peluang yang lebih daripada mencukupi untuk memfailkan afidavitnya untuk menunjukkan kausa mengapa kebenaran untuk membuat pembelaan seharusnya diberikan. Peninggalannya untuk berbuat demikian sengaja dilakukan dan diperhitungkan untuk melengahkan prosiding ini. Jika terdapat sebarang kelengahan, ia dilakukan oleh pihak defendan. Sesiapa yang datang menuntut equity mesti datang dengan tangan yang bersih ('he who comes to equity must come with clean hands'). Pengelakan teliti oleh defendan untuk memfailkan sebarang afidavit yang menunjukkan kausa mengapa beliau seharusnya diberikan kebenaran untuk membuat pembelaannya nampaknya menunjukkan bahawa defendan dan peguamcaranya berfikir dengan mengambil perkara itu dalam dua peringkat mereka boleh melengahkan perkara ini lagi. Pendaftar telah membuat keputusan yang betul apabila beliau menolak bantahan permulaan itu dan apabila menghalang defendan daripada memfailkan sebarang afidavit selanjutnya. Oleh itu, rayuan ini ditolak dengan kos. E F G

(4) Ini tidak merupakan suatu kes mengenai perintah yang dibuat oleh pentadbir tanah, mahupun sama ada gadaian yang dibuat memihak kepada AMFB itu dibuat menurut undang-undang. Jualan yang diperintahkan oleh Mahkamah Tinggi Kuala Lumpur itu telah dibatalkan atas permintaan defendan. Plaintif telah melepaskan gadaiannya ke atas tanah itu dengan persetujuan dan atas desakan defendan. Oleh itu, jualan lelong yang dicadangkan itu dijadikan terbatal kerana tidak ada gadaian untuk diselesaikan pada tarikh itu. Isu kepenyalahan undang-undang telah ditimbulkan oleh defendan yang tidak boleh dibenarkan memperkenan dan juga mengutuk transaksi yang sama. Juga terdapat soalan mengenai estopel. Tidak ada apa-apa mengenai H I

A tindakan yang diambil oleh setiap pihak kepada perjanjian itu yang menyalahi undang-undang secara intrinsik. Oleh itu, pembelaan itu langsung tidak bermerit.]

Notes

B For cases on delay in applying for summary judgment, see 2 *Mallal's Digest* (4th Ed) paras 2218–2219.

Cases referred to

1 *Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134 (refd)

C 2 *Comptroller-General of Inland Revenue Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 (refd)

3 *Malayan Finance Corp Bhd v NKM Credit Sdn Bhd & Ors* [1986] 1 CLJ 89 (folld)

4 *Jasabena Sdn Bhd v Beh Heng Poo & Anor* [1985] 1 MLJ 394 (distd)

D 5 *Development & Commercial Bank Bhd v Astrid Jorunn Saniman* [1991] 1 MLJ 435 (distd)

6 *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642 (refd)

E *TL Gan* (*Yong & Rakan-Rakan*) for the plaintiff.
S Siva (*Cheah Teh & Su*) for the defendant.

Mahadev Shankar J: This is an appeal in a matter in which the plaintiff applied for summary judgment under O 14. The writ was filed on 15 July 1991. A purported defence followed on 15 August 1991. On 3 September F 1991, an application was made to amend the statement of claim. The order to amend was made on 9 October 1991 and an amended statement of claim was filed on 25 November 1991. It was served on 6 December 1991.

The O 14 application for final judgment in terms of the amended statement of claim was filed on 9 January 1992.

G It was eventually heard on 11 December 1992 by the senior assistant registrar. By that date, the defendant had not filed any affidavit to show cause why leave to defend should be granted. Counsel for the defendant raised two preliminary objections. First, that the delay in filing the O 14 application was such that it should be disallowed and, secondly, that the affidavit-in-support of the application was defective. These preliminary H objections were dismissed. The plaintiff then wished to continue with the hearing of their application on the merits. The defendant requested an adjournment to file an affidavit to show cause why leave to defend should be granted. This application was refused and the matter was adjourned to 15 December 1992 for continued hearing because defence counsel was not I ready to submit on the merits immediately.

On 15 December 1992, defence counsel applied for a stay of proceedings pending an appeal which had been filed in the interim. The registrar granted the stay.

In the first instance, this appeal is concerned with the refusal of the registrar to permit the defendant to file an affidavit as to merits. I dismissed this appeal with costs. The substantive application then had to be dealt with. Defence counsel applied for an adjournment on two grounds. First, that there were no issues he could raise because he had been precluded from filing an affidavit to show cause, and secondly, that he intended to file an application to amend the defence which had been put in earlier so as to raise the issue that the agreement upon which the plaintiff's cause of action was based was tainted with illegality in that it contravened s 266 of the National Land Code 1965 ('the Code').

I disallowed this application for the adjournment, proceeded to hear the substantive application and gave final judgment to the plaintiff.

I now give my reasons for so doing.

The defendant is the registered owner of a piece of land in Petaling Jaya with a house thereon (hereinafter referred to as 'the said land'). At the request of the defendant, the plaintiff granted the defendant a loan in 1984. The loan was for the principal sum of RM484,500. The loan was secured by a charge on the said land. The charge was registered under Code. The defendant defaulted in complying with the terms of the charge, and on 10 July 1985, the High Court at Kuala Lumpur made an order that the said land be sold by public auction with the usual direction in such cases.

After the usual steps had been taken for the fixing of the reserve price, the appointment of the licensed auctioneer, and the finalization of the proclamation, arrangements were made for a press announcement of the proclamation for the public auction to be carried out on 27 December 1989.

On 9 December 1989, the defendant sent a letter to the plaintiff pleading for the sale to be called off. He said that he had secured a refinancing loan from Arab Malaysian Finance Bhd ('AMFB') for RM380,000 and produced a letter from that bank dated 9 December 1989 as proof. He also pleaded that since the outstanding loan was in the order of RM690,000, the balance of about RM310,000 be dealt with under private arrangement between him and the plaintiff.

The plaintiff accommodated the defendant. The sale was postponed to 17 April 1990. In the interim, they entered into a formal 'Deficiency Agreement' ('the said agreement'). The parties executed this on 1 February 1990. The said agreement provided that in return for a payment of RM380,000 by AMFB, plaintiff would discharge their charge on the said land and surrender the title deed and other relevant documents to AMFB so that AMFB could register itself as the holder of a first legal charge of the said land. As to the balance of the moneys due to the plaintiff by way of outstanding loan inclusive of all costs and expense ('the outstanding sum'), the defendant agreed to repay the same together with interest thereon. Apart from some initial payment which had to be made, the defendant covenanted in the said agreement to pay the balance of the outstanding sum in instalments of RM2,000 per month, commencing from March 1990 until the full loan was repaid. This arrangement was to continue until such time as the bank made a demand for the payment of the full balance due.

A Relying upon these arrangements which were brought about entirely by the entreaties of the defendant and for his benefit, the plaintiff surrendered its security to AMFB and accepted in its place the said agreement which was secured by the bare word of the defendant. On 10 April 1990, the plaintiff instructed its solicitor to arrange to have the auction fixed on 17 April 1990 withdrawn. AMFB had paid the plaintiff the RM380,000 on 7 April B 1990, and a copy of this letter was extended to the defendant who had to sign certain other documents in order to process the discharge of charge and the return of the title deed and other documents to AMFB. After this was done, the plaintiff's solicitor filed a notice of discontinuance of their Originating Summons No F684 of 1985 in the High Court at Kuala C Lumpur on 10 April. Their notice of discontinuance was covered with a formal letter requesting the registrar to return the title deed and the deposit. The auction was not proceeded with. The auctioneer called off the auction on 13 April 1990 and collected his charges from the plaintiff's solicitors. Thereafter, the defendant only paid two instalments and defaulted. On 28 June 1991, the plaintiff's solicitor sent a notice of demand to the D defendant for the balance of RM244,252.32. The defendant failed to comply with this notice and the writ was filed on 15 July 1991.

The defendant appointed solicitors who entered appearance for him on 3 August 1991. On 15 August 1991, a 'defence' was filed, which was nothing more than a bare denial.

E In the statement of claim, the plaintiff had prayed for judgment in the sum of RM244,252.32. In para 9 they gave a breakdown of the manner in which the amount outstanding on 7 April 1990 in the sum of RM695,351.39 had been reduced since that date to the amount claimed of RM244,252.32. Unfortunately, in the statement of claim, they omitted to include the two instalments paid by the defendant in the sum of RM4,000. So on 3 September F 1991, the plaintiff applied to amend their statement of claim to include this particular. The omission was at best clerical because it did not alter the total amount for which the plaintiffs were asking judgment.

The order to amend having been granted on 9 October 1991, the plaintiff filed their amended statement of claim on 25 November and served G it on the defendant on 6 December 1991. On 9 January 1992, the plaintiff filed this O 14 application and the first return date was 11 March. It was served on the defendant on 10 February 1992. On 11 March, the defendant's solicitor did not appear because he was in another court and the plaintiff's counsel wish to file a further affidavit. The matter was adjourned to 5 May and plaintiff's solicitors filed their further affidavit on 2 May and served it H on 4 May, ie the day before the hearing. All these affidavits did was to give some particulars of the amount claimed and proof of service of the demand letter by way of an AR registered card. The hearing on 5 May 1992 was adjourned further at the request of defence counsel to take instructions. The new date was 13 July 1992. By that date, the defendant had still not I filed any affidavit to show cause why he should be given leave to defend. Instead the defence counsel raised two objections, first, that the amended statement of claim had not been filed within 14 days of taking of the order on 9 October 1991 and, secondly that the summons-in-chambers had an

alternative prayer under O 18 for the defence to be struck out and that the plaintiff should therefore be put to election as to whether they wished to proceed under O 14 or O 18. The plaintiff said they wished to proceed under O 14 but the matter was not proceeded with on that day. It was further adjourned to 30 September 1992 for the O 14 application to be disposed of. The plaintiff took immediate action to remedy the later filing of the amended statement of claim. They applied for and got an order on 22 September 1992 extending the time for filing of the amended statement of claim to 14 days from 13 November 1991. Thus, the amended statement of claim filed on 26 November 1991 was deemed to be filed in due time.

On 13 September 1992, the hearing of the O 14 application had to be adjourned again because the defendant's solicitor was in the High Court in Kuala Lumpur. The affidavit to show cause why leave to defend should be granted had still not been filed. A new date granted was 4 November 1992. Yet again, the defendant applied for an adjournment because their solicitor was in the High Court in Kuala Lumpur. The affidavit to show cause had not still been filed. A final adjournment was granted to 11 December 1992.

On 10 December, defendant's solicitor gave notice to the plaintiff that they would be taking two preliminary objections at the hearing. The affidavit to show cause had still not been filed. The two preliminary objections which were raised were, first, that this O 14 application was filed later and should therefore be dismissed. Secondly, that the affidavit in support of the application was defective. The registrar dismissed these objections. Defence counsel then apply for another adjournment in order to permit him to file an affidavit to show cause why leave to defend should be granted. This application was refused. Before the registrar could proceed to hear the application on its merits, the defendant's solicitor informed her that he had just obtained the file and needed time to prepare for the case. The matter was then adjourned to 15 December for hearing on the merits. On that day defence counsel appeared, informed the court that he had filed an appeal and asked for a stay of proceedings. This was granted.

The notice of appeal merely states that the defendant intends to appeal against the registrar's decision on 11 December 1992 whereby she dismissed the preliminary objections of the defendant and refused to dismiss the plaintiff's O 14 application with costs, and ordered that the defendant not be given leave to file an affidavit disclosing his preliminary and other objections. The notice reads in material particular, 'dan juga memerintahkan bahawa defendan tidak dibenarkan memfail afidavit dan mengemukakan bantahan permulaan yang lain untuk menentang permohonan plaintif untuk penghakiman di bawah A 14'.

Counsel for the appellant in the course of his submission did not disclose that the defendant had filed an affidavit on 18 September 1992. The defendant had deposed to this affidavit on 16 September 1992. In this affidavit, the only material averment is that the defendant opposes the plaintiff's application for extension of time to file the amended statement of claim on the ground that the plaintiff had not given any reasonable explanation for their dilatory conduct in carrying out the order of the court.

A Only two points were argued by appellant's counsel in this appeal. The first was that between the time the defendant entered appearance on 3 August 1991 and the date on which they filed their O 14 application on 9 January 1992, there had been a delay of 4½ months and that this was fatal to the plaintiff's application. Two cases were relied upon, namely *Krishnamurthy & Anor v Malayan Finance Corp Bhd*[1] and *Comptroller-General of Inland* B *Revenue Malaysia v Weng Lok Mining Co Ltd.*[2] Whether or not a lapse of [4½] months from the date of entry of appearance to the date of the filing of the O 14 application is to be regarded as fatal must depend on the circumstances of each case. There is no hard and fast rule that the delay of four months must be held fatal in every case. The plaintiff's counsel in C response referred to *Malayan Finance Corp Bhd v NKM Credit Sdn Bhd & Ors*[3] where the court held that it was not imperative that an O 14 application must always be made before the defence is filed. Indeed, it may be advantageous to wait for the defence to see if it was a good defence before the O 14 application was filed.

What we had here was the defence which was a bare denial. Admittedly D the plaintiff should have filed the amended statement of claim within fourteen days of 9 October 1991 regardless of the need to extract the order. They filed it on 25 November and filed their O 14 application on 9 January 1992. In view of the sterile defence that had been filed, I do not agree this O 14 application as having been filed so late as to deserve to be struck out E merely on that ground.

Indeed who is the defendant to complain of delay? Delays are caused by taking objections which have no real substance. The objection to the amended statement of claim was highly technical. The error was purely clerical and the objection taken only increased the costs and added to the inconvenience of the other side whilst it may have gained some time for the F defendant. I set out at length the various dates given for the adjourned hearing and the reasons why those adjournments took place to show that if there was any dilatoriness it was on the part of the defendant. He who comes to do equity must come with clean hands. The studious avoidance by the defendant in filing any affidavit to show cause why he should be G given leave to defend tends to show that the defendant and the solicitors thought that by taking the matter in two stages they could buy even more time.

The excuse given by the defendant for not filing his affidavit for leave to show cause is that had he filed such an affidavit he would have been precluded from relying upon his preliminary objections. Two cases were H cited in support of this attitude. The first was *Jasabena Sdn Bhd v Beh Heng Poo & Anor.*[4] A passage was extracted from that case at p 396. It reads:

> Moreover, the respondents in this case had clearly waived their right to take the preliminary objection by filing affidavits in opposition and failing to give the applicant prior notice of their intention to raise the preliminary objection.

I I would observe here that this passage is not concerned with an O 14 application at all. It had to do with the issue as to whether an applicant who has filed his application for certiorari within 14 days after leave had been

granted should be treated as having complied with O 53 r 2(2) of the Rules of the High Court 1980. The applicant there had filed his application within the 14-day period. The respondent was contending and even though he had done so, r 2(2) had not been complied with because the motion had to be entered for hearing within 14 days after such leave was granted. The objection failed because prior notice of intention to raise this preliminary objection had not been given in the affidavit in opposition or at all. In other words, it is open to a defendant to give notice of his preliminary objection in his affidavit-in-reply. The second case that was cited was *Development & Commercial Bank Bhd v Astrid Jorunn Saniman*,[5] the passage relied upon here was at p 437, reading:

> However as the plaintiff had not raised any objection and had proceeded to take steps to contend [contest?] the defendant's application it must be deemed that they had waived the irregularity serious though it may be ...

In that case, the plaintiffs obtained judgment in default of appearance. The defendant applied to set aside judgment. She did so before entering conditional appearance and this was a serious irregularity. However the plaintiffs did not object to the omission to enter conditional appearance but instead took steps to contest the defendant's application to set aside. Understandably this was a step in the action which superseded the failure to enter conditional appearance. In any event, the defendant failed to set aside the service of the summons upon her.

How this case assists the defendant here, I am unable to see.

It is my finding that the defendant had ample opportunity to file his affidavit showing cause why leave to defend should be granted from the date on which that application was served on him on 6 December 1991. His omission to do so was wilful and calculated to delay these proceedings. The registrar decided correctly in dismissing the preliminary objections and in precluding the defendant from filing any further affidavits. The appeal therefore had to be dismissed with costs.

Under a Practice Direction given since this appeal was pending, O 14 applications must now be heard by the judge in chambers. I therefore directed the substantive application to be proceeded with immediately. Once again defence counsel applied for an adjournment in order to enable him to file an amended defence to put in an issue that the deficiency agreement contravened s 266 of the Code.

A party is entitled to take the issue of illegality at any time. However, in this particular case, it is clear that this defence was an afterthought. The substance of this defence was that once the order for sale made by the High Court in Kuala Lumpur had been perfected, it could not be reversed. Counsel did not cite any authority to support this proposition. And once again no prior notice of any kind had been given by the defence to the plaintiff's solicitor of this new defence.

Nevertheless, the plaintiff's counsel rose to the occasion and referred me to the Supreme Court decision of *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)*[6] where it was held that under the Code, there is nothing to prevent a chargor with the consent of the chargee to sell the charge property by private treaty but if such a sale is concluded as a purely business

A arrangement, it is for the chargee to discharge the charge to give full effect to the sale.

In the present case, it was at the instance of the defendant that the sale ordered by the High Court in Kuala Lumpur was aborted. The plaintiff had discharged their charge over the said land with the consent and at the instigation of the defendant. The proposed auction sale was therefore B rendered nugatory because there was no charge to satisfy on that date.

This is not a case of an order made by a land administrator. Nor do the arguments before me focus on whether the charge made in favour of AMFB was legally done.

The issue raised is that the said agreement is an illegal document. It is C being raised by the defendant who cannot be allowed both to approbate and reprobate the same transaction. There is also the question of estoppel. There was nothing intrinsically illegal about the acts undertaken by each of the parties to the said agreement. I regard this line of defence as being devoid of merit.

Consequently, summary judgment had to follow for the full amount D claimed by the plaintiff, ie RM244,252.32, with interest thereon at 8%pa from 28 June 1991 up to realization. The defendant will also have to pay the costs of this appeal and the costs of the action.

Appeal dismissed.

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Reported by Anne Khoo

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